

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

KEM PETERS,

Plaintiff,

v.

DARIN F. IMLAY, et al.

Defendants.

Case No. 2:20-cv-01488-GMN-EJY

**ORDER  
and  
REPORT AND RECOMMENDATION**

**RE: ECF Nos. 3, 4 and 4-1**

Before the Court is Kem Peters' Applications to Proceed *in forma pauperis* (ECF Nos. 3 and 4), and his Civil Rights Complaint Pursuant to 42 U.S.C. § 1983 (ECF No. 4-1). For the reasons stated below, although Plaintiff's *in forma pauperis* application is complete, the Court recommends Plaintiff's Complaint be dismissed with prejudice.

**I. Screening Plaintiff's Complaint**

When screening a § 1983 complaint, a court must identify cognizable claims and dismiss claims that are frivolous, malicious, fail to state a claim on which relief may be granted or seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). Dismissal for failure to state a claim under § 1915(e)(2) incorporates the standard for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012). To survive § 1915 review, a complaint must "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The court liberally construes pro se complaints and may only dismiss them "if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Nordstrom v. Ryan*, 762 F.3d 903, 908 (9th Cir. 2014) (quoting *Iqbal*, 556 U.S. at 678). "An amendment is futile if the amended [pleading] could not withstand a motion to dismiss pursuant to Rule 12, Fed.R.Civ.P." *Pullano v. NaphCare*, Case No. 2:10-cv-00335-JAD-VCF, 2014 WL 4704587, at \*5 (D. Nev. Sept. 23, 2014) (internal citations and quotation marks omitted).

1 In considering whether the complaint is sufficient to state a claim, all allegations of material  
 2 fact are taken as true and construed in the light most favorable to the plaintiff. *Wyer Summit P'ship*  
 3 *v. Turner Broad. Sys. Inc.*, 135 F.3d 658, 661 (9th Cir. 1998) (citation omitted). Although the  
 4 standard under Fed. R. Civ. P. 12(b)(6) does not require detailed factual allegations, a plaintiff must  
 5 provide more than mere labels and conclusions. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555  
 6 (2007). A formulaic recitation of the elements of a cause of action is insufficient. *Id.* Unless it is  
 7 clear the complaint's deficiencies could not be cured through amendment, a *pro se* plaintiff should  
 8 be given leave to amend the complaint with notice regarding the complaint's deficiencies. *Cato v.*  
 9 *United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

## 10 **II. Plaintiff's Complaint Fails As A Matter Of Law**

11 The Court finds Plaintiff's allegations against his Deputy Public Defenders Scott Ramsey  
 12 and Darin Imlay are ones stating ineffective assistance of counsel claims. Plaintiff generally avers  
 13 that these attorneys violated his rights through ineffective assistance of counsel by engaging in non-  
 14 confidential communications, failing to move the state court to allow confidential contacts resulting  
 15 in the loss of evidence, and refusing to file numerous motions. ECF No. 4-1 at 4-5. However,  
 16 Plaintiff's ineffective assistance of counsel claim must be brought in a habeas corpus petition under  
 17 28 U.S.C. § 2241 as Plaintiff remains in state custody. *Id.* at 1 and 3 (stating Plaintiff is a pretrial  
 18 detainee in state custody); *Stow v. Murashige*, 389 F.3d 880, 886 (9th Cir. 2004) (identifying that §  
 19 2241 is the proper habeas statute for alleged constitutional violation pre-final-judgment in a state  
 20 court criminal proceeding); *Trimble v. City of Santa Rosa*, 49 F.3d 583, 585 (9th Cir.1995) (per  
 21 curiam) (concluding that Sixth Amendment claim of ineffective assistance of counsel brought under  
 22 § 1983 is precluded under *Heck v. Humphrey*, 512 U.S. 477 (1994)). Plaintiff brings his claims  
 23 under § 1983, which provides Plaintiff no avenue for relief.

24 Further, Plaintiff's ineffective assistance claim is premature even if it is brought in a habeas  
 25 petition. Federal courts are unanimous that § 2241 may not be used to litigate ineffective assistance  
 26 of counsel [claims] prior to sentencing." *United States v. Snegirev*, Case No. A05-0024 CR JKS,  
 27 2005 WL 2122096, at \*3 (D. Alaska Aug. 29, 2005); *United States v. Pirro*, 104 F.3d 297, 298 (9th

1 Cir. 1997) (affirming the dismissal of a § 2241 petition filed before sentencing and based on  
 2 ineffective assistance of counsel because “the petition was premature”); *Dunn v. Christensen*, Case  
 3 No. 2:15-cv-01812-JCM-PAL; 2018 WL 615671 at \*8 (D. Nev. Jan. 29, 2018) (holding that an  
 4 action for ineffective assistance of counsel does not accrue until the underlying proceeding or  
 5 criminal case is resolved).

6 Plaintiff filed a Section 1983 action, not a habeas petition, before resolution of his state  
 7 criminal case. For this reason, Plaintiff’s claims against his Deputy Public Defenders fail as a matter  
 8 of law and should be dismissed with prejudice.

### 9 **III. Order**

10 Accordingly, IT IS HEREBY ORDERED that Plaintiff’s Application to Proceed *in forma*  
 11 *pauperis*, ECF No. 4 is GRANTED.

12 IT IS FURTHER ORDERED that Plaintiff’s Application to Proceed *in forma pauperis*, ECF  
 13 No. 3, is DENIED as moot.

### 14 **IV. Recommendation**

15 IT IS HEREBY RECOMMENDED that Plaintiff’s Complaint Pursuant to 42 U.S.C. § 1983,  
 16 ECF No. 4-1, be dismissed with prejudice because there is no set of fact Plaintiff can allege regarding  
 17 ineffective assistance of counsel that would survive a Fed. R. Civ. P. 12(b)(6) motion to dismiss.

18 Dated this 9th day of September, 2020

19   
 20 ELAYNA J. YOUCHAH  
 21 UNITED STATES MAGISTRATE JUDGE

### 22 **NOTICE**

23 Pursuant to Local Rule IB 3-2, any objection to this Finding and Recommendation must be  
 24 in writing and filed with the Clerk of the Court within fourteen (14) days. In 1985, the Supreme  
 25 Court held that the courts of appeal may determine that an appeal has been waived due to the failure  
 26 to file objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). The Ninth  
 27 Circuit has also held that (1) failure to file objections within the specified time and (2) failure to  
 28

properly address and brief the objectionable issues waives the right to appeal the District Court's order and/or appeal factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).